

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

ESSEX INSURANCE COMPANY,

Case No. 2:07-cv-00984

Plaintiff,

Judge Bruce S. Jenkins

vs.

EDIZON, et al.,

Defendants.

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HEARING

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TAKEN AT:

United States District Court
350 South Main Street, Room 420
Salt Lake City, Utah

DATE:

Thursday, June 3, 2010

TIME:

1:35 p.m.

REPORTED BY:

Scott M. Knight, RPR

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APPEARANCES

FOR PLAINTIFF:

GARY L. JOHNSON, ESQ.,

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FOR DEFENDANT:

CALEB J. FRISCHKNECHT, ESQ.,

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Salt Lake City, Utah 84145

Hearing

June 3, 2010

PROCEEDINGS

THE COURT: Why don't we look at Essex Insurance Company vs. Edison, and Others. It's 07-cv-984. Here today on a motion to amend answer and counterclaim. Those who are making appearances, if you'll make a record for us, tell us who you are and whom you represent.

MR. JOHNSON: Gary Johnson for
plaintiff, Essex Insurance Company, your Honor.

MR. BETTILYON: And Mark Bettilyon and Caleb Frischknecht on behalf of ACTI, your Honor.

THE COURT: You go ahead.

MR. BETTILYON: Mr. Frischknecht is going to make the argument.

MR. FRISCHKNECHT: Good afternoon, your Honor. As you will recall, this is an insurance declaratory judgment action brought by Essex Insurance Company against its insured Edizon, LC, and the third-party claimant Advanced Comfort Technology Inc., or ACTI.

As your Honor indicated, we're here on ACTI's motion for leave to file its amended answer and counterclaim which is best informed by a bit of

1 history with respect to this case and the
2 underlying case. ACTI brought 15 different causes
3 of action against Edison, the insured, in the
4 underlying state court case, several of which, ACTI
5 asserts, triggered Essex's duty to defend and
6 indemnify with respect to the policies it issued to
7 Edison, LC.

8 Now, the underlying policies have three
9 different types of insurance coverage, which are
10 not mutually exclusive; they're independent:
11 Coverage A, which is for bodily injury and property
12 damage; Coverage B, which is for personal and
13 advertising injury; and Coverage C, which is for
14 medical payments. And neither the insured, Edison,
15 or ACTI has asserted coverage under Coverage C,
16 which is not at issue. However, both Coverage A, or
17 bodily injury and property damage, and Coverage B
18 for personal and advertising injury have been at
19 issue from the outset of this case.

20 The issues with respect to Coverage A
21 for bodily injury and property damage were disposed
22 of by this Court in its summary judgment ruling in
23 March 2009. We're not here with respect to those
24 issues. However, the Court's March 2009 issue
25 ruling did not deal with the issues surrounding

1 ACTI's arguments that there was in fact coverage
2 under the provisions of Coverage B for personal and
3 advertising issue--injury.

4 Shortly after the Court's March 2009
5 order, ACTI submitted a motion for clarification
6 requesting a ruling with respect to Essex's duty to
7 defend and duty to indemnify on that point.

8 As you will recall it, your Honor, at
9 that time, Essex had expressed some concerns to the
10 Court regarding ACTI's standing to pursue coverage
11 affirmatively rather than to simply defend against
12 Essex's claim for declaratory judgment. At that
13 time the parties submitted some supplemental
14 briefing indicating ACTI's position that it has
15 been, and remains, entitled to a ruling from the
16 Court on that issue, which was the subject of
17 Essex's declaratory judgment complaint. We're now
18 here on the motion for leave to amend, which has
19 been prompted by ACTI's acquisition, by virtue of a
20 settlement, of Edizon's rights and claims under the
21 policies.

22 ACTI gave a substantial amount of
23 consideration in those settlement discussions to
24 acquire those claims, which now eliminates any
25 lingering concerns with respect to ACTI's standing

1 to affirmatively pursue coverage both with respect
2 to the duty to defend and the duty to indemnify.

3 The duty to defend in this case, just
4 to give your Honor some indication of what it might
5 be worth to ACTI, it's ACTI's understanding that
6 Essex incurred somewhere in the range of \$800,000
7 in attorneys' fees to defend the underlying case,
8 which ACTI believes were attorneys' fees that
9 should have been paid by Essex as a result of its
10 duty to defend under the policies.

11 ACTI's position further is that
12 approximately \$650,000 in damages awarded by the
13 jury in the underlying case with respect to ACTI's
14 tortious interference claims are also covered under
15 Essex's duty to indemnify under Coverage B for
16 personal and advertising injury. Accordingly, ACTI
17 is very interested in obtaining a ruling on that
18 issue.

19 In an effort to clarify the record and
20 to tee this issue up before your Honor for a
21 decision that the parties can go their mutual ways
22 on, ACTI has filed this motion for leave to amend,
23 which just simply asserts counterclaims. It
24 doesn't change ACTI's answer--substantive answer
25 with respect to Essex's affirmative claims--which,

1 again, your Honor, one of those was for a
2 declaratory judgment with respect to the coverage
3 issues under a personal and advertising injury
4 coverage. ACTI merely asserts a claim for breach
5 of contract related to the duty to defend and the
6 duty to indemnify, which claim it has acquired from
7 Edison, and claims for declaratory judgment on
8 those same issues.

9 But essentially, your Honor, those
10 issues are issues that have been before this Court
11 from the outset of this case, and which ACTI simply
12 seeks a decision on. And it believes that the
13 clean and most efficient way to put this before the
14 Court is to allow for an amended complaint--

15 THE COURT: If they've been here from
16 the beginning, why that?

17 MR. FRISCHKNECHT: Your Honor, it's
18 simply for purposes for assuring there is a clean
19 record. It is ACTI's position that from the
20 beginning of this case, as a named defendant--who,
21 I might add, would have been a Rule 19 necessary
22 party, in any event, in this case--that it had
23 standing to assert arguments with respect to the
24 issues of coverage both with respect to Coverage A
25 for personal and--personal injury and bodily injury

1 and property damage and for Coverage B, for
2 personal and advertising injury coverage.

3 The amendment simply allows this Court
4 to rule with respect to the claims that are
5 asserted in both ACTI's pleading as well as Essex's
6 pleading. But in substance, your Honor, ACTI's
7 position has always been that when Essex sought a
8 declaratory judgment against ACTI with respect to
9 the issue of availability of coverage under
10 Coverage B, part B, for personal and advertising
11 injury that ACTI had--that ACTI had standing to
12 assert that coverage, and--and should the Court
13 rule on those claims, that it would in fact entitle
14 ACTI, now that it owns those claims, to any
15 damages--

16 THE COURT: Now, it was buying those
17 claims?

18 MR. FRISCHKNECHT: --that would be paid
19 out.

20 THE COURT: Is that what you're saying?

21 MR. FRISCHKNECHT: Yes, your Honor, as
22 part of settlement. ACTI obtained a judgment
23 against Edizon, LC, as part of the underlying state
24 court action. And during its efforts to execute on
25 that judgment, formal negotiations ensued with

1 Edison, LC, and ultimately a settlement was arrived
2 by which ACTI accepted cash consideration, among
3 other things, including the claims that Edison had
4 under the policy against Essex.

5 Now, the other reason for the amended
6 complaint, your Honor, is just to make the record
7 clear that ACTI in fact owns those claims, that
8 ACTI could not have asserted the breach of contract
9 claim before because it was not the contracting
10 party but it is now able to assert the contract
11 claim for breach of the duty to defend, breach of
12 the duty to indemnify because it has acquired that
13 claim by virtue of an assignment by the insured.

14 THE COURT: Tell me exactly, how are
15 you suggesting the pleadings be amended?

16 MR. FRISCHKNECHT: ACTI has submitted
17 the proposed amended answer and counterclaim. And
18 the answer portion of the pleading has not changed.
19 It remains the same as the answer that ACTI filed
20 in this case initially. The only change to the
21 amended answer and counterclaim is the addition of
22 the three counterclaims, the assertion of the
23 breach--

24 THE COURT: They bought?

25 MR. FRISCHKNECHT: Yes, your Honor.

1 THE COURT: So you're saying since we
2 were initially here, we acquired some claims?

3 MR. FRISCHKNECHT: That's right, your
4 Honor.

5 THE COURT: Those are claims that you
6 didn't have before?

7 MR. FRISCHKNECHT: The breach of
8 contract claim ACTI did not have before because it
9 wasn't a contracting party. However, it's ACTI's
10 position that by virtue of Edizon's pleading--or
11 excuse me--Essex's pleading and declaratory
12 judgment action against ACTI with respect to
13 coverage under Coverage B of the policy, that that
14 issue has always been before this Court. And that
15 goes, your Honor, to the issue of prejudice. Under
16 the 10th Circuit case law, the primary
17 consideration with respect to a motion for leave to
18 amend is whether the nonmoving party will
19 experience prejudice as a result.

20 THE COURT: Well, if you're bringing a
21 new claim, why isn't that prejudicial?

22 MR. FRISCHKNECHT: The claim itself is
23 not new. The issues underlying the claim have been
24 here in this case from the beginning.

25 THE COURT: I thought you just told me

1 you bought three claims.

2 MR. FRISCHKNECHT: But--but your Honor
3 is correct that--that--that ACTI did not own a
4 breach of contract claim prior to this point.

5 THE COURT: So that's new?

6 MR. FRISCHKNECHT: It is new in that
7 ACTI is asserting it rather than Edizon. But those
8 claims have been a part of this case from the
9 beginning. The issue here is, is there coverage or
10 is there not coverage. And that has been at issue
11 from the very beginning of this case. And ACTI now
12 is seeking to clarify the record by filing this
13 amended answer and counterclaim so that the record
14 is clear that ACTI is now the beneficial owner.

15 THE COURT: You're either adding a claim
16 or you're not. If you're adding a claim, then you
17 ought to be direct and say we're adding a claim.

18 MR. FRISCHKNECHT: That's right, your
19 Honor. We are adding a claim.

20 THE COURT: So that's new?

21 MR. FRISCHKNECHT: Yes. Yes. Our--
22 ACTI's claim for breach of contract is a claim that
23 wasn't previously part of this case because ACTI
24 did not own it. However, the issues underlying
25 that claim have been a part of this case from the

1 beginning. And the 10th Circuit's consideration
2 with respect to whether or not the nonmoving party
3 will experience prejudice is based on its ability
4 to prepare its defense.

5 Now, Essex defends with respect to the
6 claims and issues concerning personal and
7 advertising injury has been fully developed in this
8 case, as illustrated first by the fact that they
9 asserted it affirmatively in their complaint in
10 this action; and second, it was fully briefed by
11 Essex in the summary judgment motions that occurred
12 in late 2008. The issues haven't changed; simply
13 the owner of the claim has, thereby eliminating any
14 concerns with respect to ACTI's standing in this
15 case and allowing the Court to move forward and
16 provide a substantive ruling on those issues.

17 ACTI would propose, your Honor, that
18 upon amending the complaint and allowing for Essex
19 to reply to ACTI's counterclaims, that these issues
20 could be teed up for summary judgment for the
21 Court's decision, particularly with respect to the
22 duty to defend, which--which is a substantive claim
23 that can be decided quite quickly.

24 THE COURT: Okay.

25 MR. FRISCHKNECHT: Thank you, your

1 Honor.

2 MR. JOHNSON: May it please the Court,
3 counsel.

4 I am--I don't really have much to say,
5 your Honor. Essex filed its complaint over two and
6 a half years ago. The issues that--if I understand
7 ACTI's arguments, the issues they want to bring up
8 in their counterclaim are already before the Court,
9 and I don't--finality, in and of itself, is a
10 valuable end that should be pursued, especially in
11 litigation.

12 Before the Court are pending the motion
13 for clarification on the form of the judgment,
14 whether it's going to--you know, the issues
15 relating to Coverage B have been fully briefed and
16 argued, and they were argued eloquently by counsel
17 for ACTI at the original motion for summary
18 judgment over a year ago.

19 I--I don't see the purpose or the merit
20 in the Court granting the motion to amend their
21 answer and allowing them leave at this point in
22 time, post-issuance of a judgment, to file the
23 counterclaim that I'm just going to take the very
24 same arguments they offered earlier and file a
25 memorandum--a motion to dismiss on mootness

1 grounds. It mirrors--their claims mirror the
2 claims that are already before the Court in the
3 complaint for declaratory relief. It's pointless
4 and just a waste of the Court's resources and the
5 parties' resources.

6 THE COURT: What do you want me to do?

7 MR. JOHNSON: I think the Court should
8 address their motion for clarification of the
9 judgment. And the Court should extend the judgment
10 to include the Coverage B issue and should grant
11 Essex's motion for summary judgment. That's what I
12 want you to do.

13 THE COURT: Why should I do that?

14 MR. JOHNSON: Because the facts,
15 particularly the additional supplemental pleadings
16 provided by ACTI to this Court that included the
17 jury verdict form and the Court's findings of fact
18 and conclusions of law from the underlying action,
19 establish unequivocally that all of the claims that
20 ACTI prevailed on against Edizon in the underlying
21 trial arose out of Edizon's breaching of the
22 licensing agreement and the settlement agreement--
23 and not just breaching them expressly, but Edizon's
24 breach of the implied covenants of good faith and
25 fair dealing of each of those contracts.

1 Judge Skanchy goes to great lengths in
2 his findings and conclusions to root the jury's
3 verdict and the awards of money against Edizon in
4 Edizon's breach of those two contracts. There is
5 no coverage whatsoever under the Essex policy for
6 any claim that arises out of a breach of contract.

7 And under Utah law, the phrase "arising
8 out of," as determined by Utah Supreme Court and
9 the subsequent courts of appeals' decisions, give a
10 very broad, expansive reading of that phrase. They
11 say that that is a phrase that applies to
12 originating from, related to, connected with.

13 The claims ACTI prevailed on in the
14 underlying state court action are all connected
15 with, originate from, and arise out of Edizon's
16 breach of contract. That is established by the
17 state court findings, findings of fact, and jury
18 verdict form. And we submit that--those have been
19 provided to the Court as exhibits by ACTI in
20 supplemental pleadings. They're before the Court.
21 They were entered in with respect to the motion for
22 summary judgment. And on that basis, the Court
23 should grant Essex's motion for summary judgment.

24 THE COURT: You don't insure contract
25 breaches?

1 MR. JOHNSON: No, we do not insure
2 contract breaches. That's right, your Honor, to
3 the point that not only was it in the main policy
4 form, but that was added also in another
5 endorsement just to make sure everybody--all the
6 parties to the contract understood we don't insure
7 contract breaches.

8 MR. BETTILYON: Your Honor, if I could
9 briefly address the Court. It seems to me that the
10 cleanest way to do this is, there are new things
11 here that--and the record needs to reflect that.
12 The record needs to reflect that ACTI now owns
13 these claims because they were purchased as part of
14 a settlement agreement. And that's part of our
15 amended counterclaim.

16 The other thing that needs to be done,
17 your Honor, is that there are really two different
18 issues. There's a duty to defend. And I'm sure, as
19 the Court knows, your duty to defend is oftentimes
20 triggered even if there is no underlying claim
21 under the policy. And so the law and the facts
22 applied to the duty to defend are different. And,
23 in fact, nothing that opposing counsel said even
24 remotely bears on that claim, which is completely
25 different, because it's triggered by what the

1 complaint says and what the allegations are.

2 I also want to point out that we didn't
3 prevail--ACTI didn't prevail in the underlying
4 action just on breach of contract claim. We
5 prevailed on a whole host of different tort-type
6 claims. And we believe that the advertising injury
7 policy language applies and is applicable to some
8 portion of the judgment because of that.

9 We're not asking for anything that
10 relates to damages or awarded for the breach of the
11 contract. We're asking for compensation that
12 relates to breaches that go to these other tort
13 issues that we think fall within the ambit of their
14 duty to pay damages under their insurance policy.

15 And so for all those reasons, your
16 Honor, I think the most efficient way for the Court
17 to resolve this is simply to schedule time so the
18 parties to file new motions for summary judgment.
19 I'm sure both parties will want to file them. And
20 let's address these issues with the proper facts,
21 with ACTI now owning the claims, with all of the
22 arguments related to why ACTI can't make these
23 arguments now gone from the record, because we do
24 own the claims, and we can very efficiently and
25 quickly revolve most, if not all, these issues on

1 summary judgment. And I just think it would be a
2 quick, efficient way for the Court to resolve these
3 issues that have not been resolved by the Court
4 because your prior order did not address the
5 Coverage B issues, which is the only thing we've
6 added, or the only thing we're talking about now in
7 this case.

8 THE COURT: What specific torts are you
9 talking about?

10 MR. BETTILYON: The specific torts--
11 Caleb is probably more able to handle that than I
12 am, your Honor. I'll have him up and we can both
13 address that.

14 MR. FRISCHKNECHT: As I mentioned
15 earlier, your Honor, there are 15 claims in the
16 underlying complaint.

17 THE COURT: I only need one good one.

18 MR. FRISCHKNECHT: And two of which had
19 to do with tortious interference. One was tortious
20 interference with a contract between ACTI and a
21 company called Sunshine Manufacturing. And one was
22 a claim for tortious interference with prospective
23 economic relations, dealing with person--other
24 persons in the marketplace with whom--

25 THE COURT: Are there findings in

1 reference to those two?

2 MR. FRISCHKNECHT: There are--with
3 respect to the special verdict form, yes, your
4 Honor. And with respect to the findings of fact
5 and conclusions of law, I believe there are
6 findings there as well.

7 THE COURT: Did--was there an
8 affirmative finding?

9 MR. BETTILYON: There were affirmative
10 jury--the jury found in favor of ACTI on those
11 claims.

12 MR. FRISCHKNECHT: And awarded
13 approximately, between the two of them, \$650,000.

14 THE COURT: What do those torts have to
15 do with advertising?

16 MR. BETTILYON: Well--and again, maybe
17 Mr. Frischknecht can address this, but generally
18 speaking, your Honor, the argument we have is one
19 of the things that the Edizon was doing in the
20 marketplace is that it was telling people that we
21 were bankrupt, we were going out of business. And
22 we believe that under the advertising injury policy
23 and under the language of the claims under the
24 language of the insurance contracts, that those
25 types of defamatory statements are covered under

1 the advertising injury theory of liability. And we
2 also think that because we have raised those as
3 allegations in the underlying complaint, the duty
4 to defend was also triggered separate and apart
5 from the fact that we also obtained a ruling on
6 that.

7 THE COURT: The language in your
8 underlying complaint, what did it say?

9 MR. BETTILYON: Let me have Mr.
10 Frischknecht address that.

11 MR. FRISCHKNECHT: If I may, your Honor,
12 perhaps it would help as well to have the language
13 from the policy. The language from the policy
14 requires Essex to indemnify for any damages arising
15 out of personal and advertising injury and to
16 provide a defense for suits involving those
17 damages.

18 Personal and advertising injury is
19 defined as follows in the policy: It means injury,
20 including consequential bodily injury arising out
21 of one or more of the following offenses--and then
22 there are a number of predicate acts here that
23 trigger coverage. The one that ACTI's tortious
24 interference claims fit into is 14(D), which is
25 oral or written publication in any manner of

1 material that slanders or libels a person or
2 organization or disparages a person's or
3 organization's goods, products, or services.

4 In the second amended complaint, if I
5 may grab my notes, ACTI alleged these tortious
6 interference claims based on a number of underlying
7 facts, including--and perhaps I can provide the
8 Court with some specific paragraphs to look at
9 here--paragraphs 11, 55, 73, 99, and 166 in which
10 ACTI alleges that Edizon made false
11 representations--

12 THE COURT: Read those to me.

13 MR. FRISCHKNECHT: Paragraph 11 simply
14 explains that ACTI was an exclusive licensee of
15 various forms of intellectual property. Paragraph
16 55 states that on August 30th, 2006, Edizon
17 instructed Sunshine Manufacturing, the third party
18 here, to refuse to fill purchase orders. Sunshine
19 indicated that it would not fill the purchase
20 orders because Edizon, which was not a party to the
21 supply agreement--agreement, instructed Sunshine to
22 breach the supply agreement by not fulfilling
23 ACTI's purchase orders. And that was based, your
24 Honor, on the underlying statements that were made
25 by--

1 THE COURT: Read me the statements that
2 you say in your complaint.

3 MR. FRISCHKNECHT: Paragraph 73:
4 Because of Edizon's continued false representations
5 to others in the industry that the license
6 agreement is terminated, ACTI has been
7 significantly constrained in its attempts to expand
8 and grow its business. For instance, at least two
9 franchisees have declined to do business with ACTI,
10 resulting in a loss in excess of 1 million in
11 franchise fees alone.

12 THE COURT: So the franchise is no
13 good?

14 MR. FRISCHKNECHT: The idea here is that
15 ACTI had franchises--franchisees who were going to
16 sell ACTI's products. And Edizon was telling these
17 franchisees the license agreement is terminated,
18 which was not true.

19 THE COURT: Okay.

20 MR. FRISCHKNECHT: And--and therefore,
21 the implication is, ACTI's products are illegal and
22 if you were selling them, you would be selling
23 illegal products.

24 THE COURT: Okay.

25 MR. FRISCHKNECHT: And there are others.

1 THE COURT: That's an implication to
2 read into it, anyway.

3 MR. BETTILYON: This is a point of
4 reference--and I apologize, but the reason they
5 claimed the license agreement was terminated was
6 because ACTI was insolvent. So that was the--

7 THE COURT: Well, where do you say that
8 in your pleadings?

9 MR. BETTILYON: I think it was implicit
10 in the pleadings. And it was certainly implicit--

11 THE COURT: Well, you don't expressly
12 state it in the pleadings at all.

13 MR. BETTILYON: Well, if--if it's not in
14 the pleadings, your Honor, it certainly was the
15 central theme at trial, without question.

16 MR. FRISCHKNECHT: If I may, your Honor,
17 the--our opposing memorandum has also outlined a
18 number of paragraphs that I don't have before me
19 but that talk specifically about the allegations in
20 the complaint that ACTI believes.

21 THE COURT: But you're saying no
22 franchise, bad franchise. You say that equals
23 advertising?

24 MR. FRISCHKNECHT: Advertising, again,
25 your Honor, is a defined term under the policy.

1 Personal and advertising injury means oral or
2 written publications in any manner.

3 THE COURT: Well, what you're
4 complaining about is, you say no franchise. That's
5 what you're talking about.

6 MR. FRISCHKNECHT: Well, the paragraph
7 in the complaint states that Edizon made false
8 representations to the franchisees that the license
9 agreement was terminated. Let me read that again,
10 your Honor.

11 I apologize. It's a lengthy complaint.

12 Here in paragraph 73: Because of
13 Edizon's continued false representations to others
14 in the industry that the license agreement is
15 terminated--so including the franchisees and
16 others--ACTI has been specifically constrained in
17 its attempts to expand and grow its business. For
18 instance, at least two franchisees have declined to
19 do business with ACTI, resulting in a loss in
20 excess of 1 million in franchise fees alone.

21 So the tortious interference claim was
22 based, at least in part, on Edizon's alleged
23 continued false representations to others in the
24 industry that the license agreement is terminated.

25 THE COURT: That was an oral statement?

1 MR. FRISCHKNECHT: Yes, your Honor.

2 THE COURT: Not a written statement?

3 MR. FRISCHKNECHT: I do not believe so.
4 But I don't believe the insurance policy requires--
5 it says oral or written publication.

6 THE COURT: Well, I just wanted to nail
7 it down as to which it was.

8 MR. BETTILYON: And, your Honor, it is
9 both. There are--there are documents that were
10 produced during the trial that demonstrate that
11 that statement was made both orally and was made in
12 writing to various parties, and similar statements
13 that were false.

14 THE COURT: When you first say "please
15 defend," you furnish a copy of the document to the
16 carrier and say "please defend." And so it's the
17 complaint. It's the complaint on which people make
18 a determination as to whether they will or whether
19 they won't.

20 MR. FRISCHKNECHT: And--and if I may,
21 your Honor, that duty to defend, if--if--arising
22 from the complaint is not extinguished until there
23 are facts that eliminate the possibility for
24 liability that might be covered by the policy--
25 which is why, your Honor, the various exclusions

1 that have been raised-- for example, the breach of
2 contract exclusion, even if we assume that Judge
3 Skanchy's rulings in the end may possibly have
4 eliminated the duty to indemnify--those rulings
5 were not made until after trial. They could not
6 have eliminated the duty to defend until those
7 findings were made.

8 A careful reading of the complaint shows
9 that there was a possibility, under the second
10 amended complaint, that ACTI would eventually
11 recover damages on its tortious interference claims
12 that were covered under the policy based on these
13 false representations.

14 THE COURT: Now, where in Skanchy's
15 rulings does he determine on a item-specific basis
16 anything other than breach? I mean, this was a
17 jury trial, wasn't it?

18 MR. FRISCHKNECHT: Yes, your Honor.

19 THE COURT: Did the jury have the
20 special verdict?

21 MR. FRISCHKNECHT: Yes, your Honor.

22 THE COURT: Now, was the--was a
23 question--let's put it that way--interrogatory, a
24 query made of the jury as to the advertising claim?

25 MR. FRISCHKNECHT: The jury made a

1 finding with respect to the tortious interference
2 claims.

3 THE COURT: Now--

4 MR. FRISCHKNECHT: There was no--

5 THE COURT: How do we equate the
6 tortious interference claim with the advertising
7 claim?

8 MR. FRISCHKNECHT: In--in the briefing
9 on this issue, particularly the Cincinnati case
10 that was cited in that--in that brief, the
11 insurance case law is fairly clear that pleading
12 labels don't matter with respect to whether or not
13 damages or conduct is covered under the policy.
14 What ultimately matters are the underlying facts.

15 THE COURT: And ostensibly, the jury is
16 finding facts. And I'm--my inquiry: No one ever
17 gave a specific inquiry to the jury as to the
18 advertising claim. There was a--apparently a
19 general inquiry made in reference to tortious
20 interference. Was there any division ever made by
21 the jury as to anything other than a--an amount, a
22 single amount?

23 MR. FRISCHKNECHT: There were several
24 special interrogatories submitted to the jury, but
25 as to any question that would segregate out

1 personal or advertising injury, no. And ACTI would
2 submit to the Court, your Honor--

3 THE COURT: It's all lumped together?

4 MR. FRISCHKNECHT: Yes.

5 And ACTI would submit to the Court, your
6 Honor, that there is good 10th Circuit case law
7 that where an insurer selects not to defend and
8 special interrogatories are not sent to the jury to
9 determine--to separate out covered and noncovered
10 damages, that the burden falls on the insured to
11 prove that the damages awarded by the jury were in
12 fact not covered. That citation is not in the
13 briefing because that issue didn't come up the
14 first time around. Another reason why, your Honor,
15 we would appreciate an opportunity to brief those
16 summary judgment issues.

17 In light of that, we do believe, your
18 Honor, that it is possible for this Court to
19 dispose of both the duty to defend and the duty to
20 indemnify on summary judgment.

21 THE COURT: Well, ultimately what are
22 you really asking for?

23 MR. FRISCHKNECHT: Your Honor, we would
24 like this Court to allow the filing of this amended
25 answer and counterclaim, thereby clarifying the

1 record that ACTI now owns all of the claims with
2 respect to the Essex policies, and then allow the
3 parties to submit cross motions for summary
4 judgment, and at that point decide on a clear
5 record the issues with respect to personal and
6 advertising injury.

7 THE COURT: Now, you're talking about
8 money, ultimately?

9 MR. FRISCHKNECHT: Yes, your Honor.

10 THE COURT: Tell me what money you're
11 talking about.

12 MR. FRISCHKNECHT: With respect to the
13 duty to defend, your Honor, it's our
14 understanding--and we're still communicating with
15 counsel for Edizon on this issue and finalizing
16 affidavits and declarations to this effect--but
17 currently, ACTI understands that Edizon expended in
18 the range of \$800,000 on attorneys' fees to defend
19 the underlying case, and that those fees--

20 THE COURT: They lost that, didn't they?

21 MR. FRISCHKNECHT: I'm sorry, your
22 Honor?

23 THE COURT: Did they win that or lose
24 it?

25 MR. FRISCHKNECHT: They lost that. They

1 spent that money in defending the case. They spent
2 that money to pay their attorneys.

3 THE COURT: And he lost the case?

4 MR. FRISCHKNECHT: Yes.

5 THE COURT: You're asking the insurance
6 company here to pay for losing the case?

7 MR. FRISCHKNECHT: Yes, your Honor.

8 THE COURT: And anything else?

9 MR. FRISCHKNECHT: In addition to that,
10 we believe that the damages awarded by the jury on
11 the tortious interference claims, which amount to
12 approximately \$650,000, are indemnifiable under the
13 policy.

14 THE COURT: Now, why are they
15 indemnifiable?

16 MR. FRISCHKNECHT: The jury awarded
17 \$650,000 and up to the limits of insurance, which I
18 understand to be a million dollars under the
19 policy.

20 THE COURT: But how do you identify the
21 six-fifty with the tortious interference?

22 MR. FRISCHKNECHT: On the special
23 verdict form, the jury awarded approximately
24 \$304,000 on Claim No. 5, which is tortious
25 interference, with respect to Sunshine

1 Manufacturing; and I believe it's Claim No. 13 for
2 tortious interference with respect to economic
3 relations. The jury awarded approximately
4 \$350,000, the sum total of those being
5 approximately \$655,000.

6 THE COURT: Okay. You tell me that
7 tortious interference by the insured is covered?

8 MR. FRISCHKNECHT: Yes, your Honor. And
9 we've submitted in our brief--and we'll submit, if
10 given the opportunity, several cases from federal
11 district courts and federal circuit courts finding
12 that tortious interference, under the right
13 circumstances, were involving false representations
14 to third parties, are in fact coverable under this
15 very provision. We're dealing with a CGL policy,
16 which is used broadly across the country. And ACTI
17 has cited a number of decisions which have in fact
18 held that those damages were indemnifiable under
19 exact policy language used in this case.

20 THE COURT: For intentional action on
21 the part of the insured?

22 MR. FRISCHKNECHT: Yes, your Honor.

23 And the distinction there is, insurance
24 policies can cover intentional actions as long as
25 they don't cover actions that--that--where--perhaps

1 the better explanation here would be in the
2 exclusions themselves that have been raised by
3 Essex.

4 For example, the two policy exclusions
5 at issue here--knowing violation of rights of
6 another and material publishing with knowledge of
7 falsity--go to intentional acts. And this is what
8 the policy says is excluded: Personal and
9 advertising injury caused by or at the direction of
10 the insured with the knowledge that the act would
11 violate the rights of another and would inflict
12 personal and advertising injury.

13 And with respect to knowledge of
14 falsity--

15 THE COURT: That's excluded?

16 MR. FRISCHKNECHT: Yes, your Honor.

17 With respect to knowledge of falsity,
18 personal and advertising injury arising out of oral
19 or written publication of material, if done by, or
20 at the direction of, the insured with knowledge of
21 its falsity.

22 Now, your Honor, with respect to a
23 tortious interference claim, it's highly possible
24 to not know that the statements that you were
25 making were false but still commit tortious

1 interference.

2 And a case that I think might be
3 helpful to the Court on that point that was decided
4 by Judge Campbell, the Ohio Casualty Case. And the
5 cite on that is 464 Fed.Supp. 2nd 1168. In that
6 case, it was very similar to this case in that
7 there were tortious interference claims alleged by
8 the third-party claimant against the insured. And
9 Judge Campbell said in that case the duty to defend
10 is implicated because it's possible to recover for
11 tortious interference without knowing that those
12 false representations were indeed false. That's
13 what happened here.

14 Your Honor, when this case went to
15 trial, Edizon's defense was "Well, we believed that
16 the contract was actually terminated. We didn't
17 think that our"--"that our statements were false
18 when we made them." And it's very possible that
19 the jury could have believed them because, again,
20 tortious--

21 THE COURT: But it held against them.

22 MR. FRISCHKNECHT: The jury could have
23 believed that they didn't--that they didn't know
24 that those statements were false and still found
25 them liable for tortious interference. For

1 tortious interference--a claim for tortious
2 interference is stated where somebody intentionally
3 interferes with a contract with improper means or
4 improper purpose. And in this case, the improper
5 means were the false statements.

6 Now, the improper means would lower down
7 to a tort of defamation or commercial
8 disparagement. That's what had to be proved in
9 order to reach tortious interference. And
10 defamation as well as disparagement can be proven
11 simply in the right circumstances by proving
12 negligence or even a recklessness with respect to
13 the truthfulness of the statements.

14 Certainly that's not true if you're
15 dealing with public figures, but none of that was
16 at issue here. There weren't any First Amendment
17 issues with respect to those statements. They
18 weren't protected any more than any other
19 statements.

20 ACTI could have and, we believe, did
21 prevail simply by showing that those statements
22 were false, that--and that they were made by Edizon
23 for the purpose of interfering with the contract
24 with the intent to--

25 THE COURT: They made the statements

1 innocently, they didn't know that they were false?

2 MR. FRISCHKNECHT: Or it could have been
3 that they made them--they made them negligently.

4 ACTI could have recovered even if the statements
5 were made negligently. And that's why our tortious
6 interference claims, at minimum--at the outset,
7 when they were alleged, there is no allegation in
8 the complaint that the false representations
9 alleged in paragraph 73 were made with knowledge
10 that they were false. That's the distinction. And
11 that's why the duty to defend was triggered here.

12 Edizon--at the time the complaint was
13 filed, it was very possible that ACTI would
14 eventually recover damages on those tortious
15 interference claims, even though Edizon didn't know
16 the statements were false, as long as ACTI proved
17 that the statements were false, that they were made
18 recklessly or negligently, and then satisfied the
19 other elements of the tortious interference claim,
20 which is why these other courts, the cases that
21 we've cited to the Court in our brief, have upheld
22 awards to third parties or insureds based on this
23 very provision for personal and advertising injury
24 coverage on tortious interference claims.

25 THE COURT: Okay.

1 MR. FRISCHKNECHT: Thank you, your
2 Honor.

3 MR. JOHNSON: The two tort claims that
4 ACTI hangs their hats on--one is tortious
5 interference with contractual relations, which in
6 Judge Skanchy's findings of fact, conclusions of
7 law, and order talks about as being internally
8 related or essentially the flip side of a--he says:
9 In addition, the jury's finding concerning Edizon's
10 interference with ACTI's rights in the supply
11 agreement necessarily occurred during the summer of
12 2006. The jury's findings that Edizon tortiously
13 interfered with ACTI's contractual relationship
14 with Edizon's sister company, Sunshine, have a
15 bearing on another finding of the jury. The jury
16 found that Edizon breached the covenant of good
17 faith and fair dealing.

18 And if you read through Judge Skanchy's
19 findings, you'll see he ties the tortious
20 interference with contract claim which arose out of
21 some statements made to the breach of the implied
22 covenant of good faith and fair dealing that they
23 had in the supply agreement.

24 So with respect to the tortious
25 interference with contractual relations claim, that

1 arises out of the breach of contract, the breach of
2 the supply agreement. And we rely on Judge
3 Skanchy, who sat there, who heard the testimony
4 come in, and his findings of fact and his
5 conclusions of law with respect to those two causes
6 of action as being internally related as supporting
7 the argument that the tortious interference with
8 contractual claims arises out of, originates from--
9 however you want to put it-- has a nexus with the
10 breach of the supply agreement.

11 With respect to their argument that the
12 tortious interference claim--tortious interference
13 with respect to economic advantage all by itself
14 supports a claim for coverage--first, the cases--
15 and I think I actually discussed this in--in one of
16 the pleadings--the cases that were cited by ACTI in
17 their original pleadings on this matter were all
18 cases that addressed the duty to defend.

19 Your Honor, it is true that as a matter
20 of common law, the duty to defend is broader than
21 the duty to indemnify. And that's--that's a judge-
22 made rule. Just like the made whole doctrine,
23 which says if an injured party isn't made whole,
24 then the insurance company, as their insurer, can't
25 step in their shoes and subrogate against somebody

1 until they're made whole. Until they're completely
2 repaired and fixed up, you can't take any money
3 from some tort-feasor out there, insurance company.
4 You got to make sure your insured is made whole.
5 That's a judge-made rule.

6 However, Utah Supreme Court has made
7 clear that if the insurance contract itself
8 addresses such issues, then the judge-made rules
9 give way to the terms of the contract, to the
10 agreement of the parties. And in fact, Utah
11 Supreme Court has ruled that the made whole
12 doctrine doesn't apply if the insurance contract
13 says the insurer gets dollar one first. Then the
14 made whole doctrine gets put to the side because
15 the parties have spoken in terms of the contract.

16 In our complaint for declaratory relief,
17 your Honor, we cite to a provision in the
18 endorsement, the combined general endorsement
19 that's attached to this policy, that says
20 specifically if there is no coverage, there is no
21 duty to defend. So for purposes of this case
22 before the Court, the parties have agreed in the
23 contract that the duty to defend is not broader
24 than the duty to indemnify. And if there is no
25 duty to indemnify, there is no duty to defend.

1 And I would urge the Court to review
2 the findings of fact, conclusions of law, and order
3 issued by Judge Skanchy. I would urge the Court to
4 read the special jury verdict form and review the
5 findings of the jury. And I think the Court's
6 skepticism about coverage will be confirmed, that
7 the findings are such that the tortious
8 interference with prospective economic relations
9 claim will fall due to the exact exclusions that
10 have been cited by ACTI's counsel here and
11 discussed with the Court that are in the body of
12 the policy, as well as the other exclusionary
13 provisions that are in what's called the combined
14 endorsement that was added to this 2006-07 policy
15 which is at issue in this case.

16 THE COURT: Counsel initially filed a
17 motion asking for clarification. In your view,
18 what clarification needs to be made?

19 MR. JOHNSON: I think the Court needs
20 to make an affirmative finding that the findings of
21 the jury and the trial court in the underlying
22 action are such as to invoke numerous exclusions,
23 invoke--that are directly applicable to the only
24 two claims that I think are in dispute: tortious
25 interference with contract, tortious interference

1 with respect to economic advantage.

2 Further--

3 THE COURT: Counsel argues that the
4 exclusion is of such a nature as to require an
5 intentional interference and he suggests that one
6 could find interference without the existence of
7 intentional interference.

8 MR. JOHNSON: I know that, your Honor.
9 It brought to mind something I remember reading in
10 Judge Skanchy's findings of fact, where he actually
11 starts talking about some of the testimony of some
12 of the Edizon principals. And Edizon was making
13 some arguments that they hadn't really breached any
14 contract so they hadn't done anything bad, and that
15 the jury--that's what the jury hadn't found that
16 they'd done anything bad.

17 And Judge Skanchy says during the trial,
18 Mr. Tony Pearce, who was a principal of Edizon,
19 acknowledged that the notices of incurable breach
20 letters that were sent to ACTI on January 21st,
21 2006, violated paragraph 22 of the settlement
22 agreement. There was testimony elicited at trial
23 that they were intentionally doing things they knew
24 were in breach of--of their--of the settlement
25 agreement they'd entered into with ACTI over their

1 first round of disputes.

2 I don't know what testimony counsel is
3 alluding to, because the testimony that's in the
4 record before this Court is recitations of
5 intentional conduct by Edizon in wrongdoing.

6 I--I think the Court needs to go off
7 the information that it has, that's provided to it,
8 that's in the record about what was--what Edizon--
9 what testimony came in about Edizon's conduct at
10 trial.

11 THE COURT: Tell me what you want
12 clarified.

13 MR. FRISCHKNECHT: Your Honor, the
14 motion for clarification was filed simply because
15 ACTI's understanding of the March 2009 ruling was
16 that it didn't rule on the issues of whether or not
17 Essex had a duty to defend with respect to Coverage
18 B, personal and advertising injury, and whether
19 Essex had a duty to indemnify with respect to
20 personal and advertising injury.

21 THE COURT: Why don't you read to me
22 the abbreviated order that was sent out.

23 MR. FRISCHKNECHT: Well, I apologize,
24 your Honor. It was not included in my hearing
25 binder. I do have a few quotes, but it wouldn't

1 be complete. It's from our brief.

2 My understanding of that ruling is that
3 the Court ruled that there was no occurrence within
4 the meaning of the Essex policy and that there
5 wasn't any property damage as defined by the
6 policy, and therefore, that there was no useful
7 purpose in dealing with the remaining issues.

8 And ACTI's concern with respect to that
9 ruling, your Honor, is that the term "occurrence"
10 has no relevance to Coverage B. The term
11 "occurrence" isn't used in personal and advertising
12 injury. And whether or not there was an occurrence
13 with respect to Coverage A for bodily injury or
14 property damage doesn't bear on whether there's
15 coverage for personal and advertising injury under
16 Coverage B.

17 Your Honor, if I may address a few of
18 the points raised by Mr. Johnson. Your Honor,
19 you're hearing a lot of things today for the first
20 time, which, again, is one more reason to allow the
21 parties to submit a clean record on which this
22 Court can decide the issues finally and
23 dispositively.

24 I would mention that a full reading of
25 Judge Skanchy's ruling would indicate that some of

1 those statements were somewhat taken out of context
2 and are likely not applicable to what we're arguing
3 here.

4 I would also remind the Court that this
5 was a jury trial and that the findings of fact and
6 conclusions of law issued by Judge Skanchy had to
7 do with respect to a claim for declaratory judgment
8 that was not tried to the jury. Those findings of
9 fact and conclusions of law are not binding on this
10 Court with respect to these issues.

11 And finally, I would say, and most
12 importantly, your Honor, those findings of fact and
13 conclusions of law were issued long after the trial
14 in that case. They have no bearing on whether or
15 not--

16 THE COURT: That took a long time to
17 get there, I--

18 MR. FRISCHKNECHT: Yes, your Honor,
19 years.

20 THE COURT: I noticed that.

21 MR. FRISCHKNECHT: Which explains the
22 \$800,000 in--approximately, in attorneys' fees.

23 Now, those findings of fact and
24 conclusions of law, again, your Honor, have no
25 bearing on the duty to defend, which determination

1 was made at the time the complaint was filed and
2 submitted to the insured.

3 THE COURT: Well, that really has to do
4 with the nature of the complaint.

5 MR. FRISCHKNECHT: Yes, your Honor.

6 And Utah case law--in particular, a case
7 cited in our brief, Benjamin vs. Amica Mutual,
8 decided by the Utah Supreme Court in 2006,
9 indicates that with respect to the duty to defend,
10 what really matters is the language of the
11 complaint and that the insurer has a duty to defend
12 until facts and circumstances arise showing that
13 under no circumstance will the insured be held
14 liable in that case for damages that are covered
15 under the policy.

16 To the extent Mr. Johnson and Essex
17 assert that that happened after the trial, even if
18 that is the case, which we don't agree with, for
19 reasons that we've stated before, it certainly
20 didn't eliminate the duty to defend while Edizon
21 was racking up hundreds of thousands of dollars in
22 fees.

23 For all these reasons, your Honor, we
24 think it would be in the interest of justice and
25 the interest of efficiency to allow the complaint

1 to be amended and these issues to be carefully
2 briefed before the Court and decided once and for
3 all.

4 THE COURT: Thanks a lot. I'll reserve
5 on your motion, go from there. Thanks a lot.
6 Appreciate your help.

7 MR. JOHNSON: Thank you, your Honor.

8 THE COURT: We'll be in recess till
9 9:30 tomorrow.

10 (Proceedings concluded at 2:28 p.m.)

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